(1) Supreme Court, U.S.
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No. ____

IN THE UNITED STATES SUPREME COURT

October, 1994 Term

JAMES KENNETH McELDOWNEY, Jr.,

Petitioner,

-versus-

NATIONAL CONFERENCE OF BAR EXAMINERS,

Respondent.

PETITION FOR WRIT OF *CERTIORARI*

ON *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(Circuit Case No. 94-55036)

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Petitioner, *in pro se*

47pp

QUESTIONS PRESENTED

1. In view of the constitutional rights secured by this Court's holding in Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232 (1957), can it properly be said, as a matter of law and without reference to its terms, that an agreement between a State's professional licensing board and a private examiner has no purpose or function of conferring any benefit on any person who sits for the examination?

2. In light of this Court's holdings in Guaranty Trust Co. v. York, 326 U.S. 99, and Sohn v. Waterman, 84 U.S. 596, together with their respective progeny, may the interpretations of substantive state law by a district court entertaining a diversity case properly and summarily be affirmed, when such interpretations (1) fail to heed the rules of decision of the State's highest court, as previously recognized by the reviewing circuit court, and (2) operate to bar an action when it accrues?

PARTIES TO THE PROCEEDING

All parties to this proceeding are reflected in the caption.

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JAMES KENNETH McELDOWNEY, Jr.,

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PETITION FOR WRIT OF *CERTIORARI*

**ON *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(Circuit Case No. 94-55036)**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, James Kenneth McEldowney, Jr. ("McEldowney,") hereby petitions this Court for a writ of *certiorari* to review the decision of the United States Court

of Appeals for the Ninth Circuit ("the Ninth Circuit") filed (without mention of entry) in this action on August 9, 1994.

OPINIONS BELOW

The decision of the District Court is reported at 837 F. Supp. 1062 (C.D. Cal. 1993), and duplicated herein at Appendix page 4. The unpublished Memorandum Opinion of the Ninth Circuit is appended hereto, at Appendix page 2.

BASIS FOR JURISDICTION

The final judgment of the Court of Appeals was filed on August 9, 1994. On October 27, 1994, the Ninth Circuit entered its order denying rehearing.

On January 20, 1995, Justice O'Connor signed an order extending the time to file a petition for writ of *certiorari* to and including February 24, 1995. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and all Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Amendment XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, United States Code, §1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

California Civil Code §1559:

A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

California Code of Civil Procedure §312:

> Civil actions, without exception, can only be commenced within the periods prescribed in this title, ***after the cause of action shall have accrued,*** unless where, in special cases, a different limitation is prescribed by statute. ..

Emphasis supplied.

California Code of Civil Procedure §339:

> Within one year:
>
> (1) An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.
>
> (2) An action upon a statute for a forfeiture or penalty to the people of this state.
>
> (3) ***An action*** for libel, slander, assault,

battery, false imprisonment, seduction of a person below the age of legal consent, or ***for an injury to*** or for the death of ***one caused by the*** wrongful act or ***neglect of another***, or by a depositor against a bank for the payment of a forged or raised check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or foul or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professions Code, for such person's neglect resulting in injury or death to an animal or foul in the course of boarding or feeding such animal or foul or in the course of the practice of veterinary medicine on such animal or foul.

(4) An action against an officer to recover damages for the seizure of any property for

a statutory forfeiture to the state, or for the detention of, or injury to property so seized, or for damages done to any person making such seizure.

(5) An action by a good faith improver for relief under Chapter 10 (commencing with Section 871.1) of Title 10 of Part 2 of the Code of Civil Procedure. The time begins to run from the date upon which the good faith improver discovers that the good faith improver is not the owner of the land upon which the improvements have been made.

Emphasis supplied.

STATEMENT OF THE CASE

A. Introductory Statement of Facts

For good cause, admission to the California State Bar requires more than merely sitting successfully for written examinations. In addition, one must be determined to be of good moral character.

On July 31, 1991, McEldowney sat for the Multistate Bar Examination ("MBE") as part of the California Bar Examination offered by the State Bar of California and its Committee of Bar Examiners (collectively, "the State Bar.") The MBE is an examination prepared and scored by the Defendant and Appellee, National Conference of Bar Examiners ("NCBE.") It is administered in virtually every State and Territory. The MBE consists of 200 multiple-choice questions. Bar applicants are required to choose the best one of four alternative answers to each question.

The NCBE regularly prints and distributes to prospective examinees a brochure explaining the MBE and the method by which it is administered and scored. In its brochure describing the 1991 MBE, the NCBE represented without qualification that only one of the four alternative answers for any given question would be considered as correct and so awarded a point.

In November, 1991, McEldowney received notice from the State Bar that he had not passed the July, 1991, bar examination by a margin equivalent to what would have been awarded for one (1) "best" MBE answer. His scores were accompanied by a form setting forth, among other things, the State Bar's policy on reconsideration of bar examination results. The form provided, in part, as follows:

> [T]he Committee will not entertain requests for reconsideration unless the applicant establishes that one of the following resulted

> in failure or prevented the examination from being reappraised: 1) a departure from established procedures; or 2) an arithmetical error in the calculation of the total written score from the final grades assigned to each question; or 3) an arithmetical error in the calculation of total scores; or 4) a clerical error.

Thus, the State Bar reviews only procedural issues, but not those of substantive law.

In January, 1992, McEldowney reviewed the MBE questions, answers, and his score. He was not in any manner allowed to document the results of his review. However, McEldowney found that, as to at least four of the two hundred questions, the NCBE had awarded points for other than clearly the "best" answer[1] to the end that his

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[1] The answers for which points were awarded were in conflict with holdings of this Court.

MBE (and presumably thousands of others) had been scored incorrectly.

In March, 1992, McEldowney petitioned the State Bar to review his MBE score. His petition set forth in detail the bases of his assertions of substantive error.

In May, 1992, the State Bar notified McEldowney that his petition would not be entertained, citing the above-quoted policy whereby only procedural issues are reviewed.

In June, 1992, McEldowney caused the NCBE to be contacted directly regarding his MBE score, and provided the NCBE with the contents of his petition to the State Bar. The NCBE denied any irregularity in scoring McEldowney's MBE and refused to supply further information because of the alleged "secure" nature of the examination. Although McEldowney attempted further correspondence, he received no further response.

On August 5, 1992, McEldowney received notice from the State Bar of a favorable determination as to his moral character and thus learned that, *but for his MBE score*, he would have been certified for admission to the practice of law.

This action ensued.

B. Procedural History

This action was commenced on June 1, 1993, by McEldowney filing his complaint in the United States District Court for the Central District of California. The complaint named the NCBE as the sole defendant, and set forth two claims for relief. McEldowney first sued as a third-party beneficiary to the contract between the State Bar and the NCBE, and secondly for negligence as a result of the NCBE awarding points for incorrect answers but not for correct responses.

The NCBE moved to dismiss for lack of subject matter jurisdiction, its asserted quasi-judicial immunity,

and for failure to state a claim upon which relief could be granted.

Without hearing, the District Court denied the motion on the grounds of lack of jurisdiction, but *specifically concluded that it had subject matter jurisdiction under 28 U.S.C. § 1332.* Further, the court rejected the NCBE's assertion of quasi-judicial immunity in view of its own admission that its function is merely administrative. However, it granted the motion on the grounds that (1) the State Bar-NCBE contract "has no purpose or function of conferring any benefit on any [bar applicant]," and that (2) the negligence claim was time-barred because McEldowney "should have discovered the NCBE's asserted [']negligence['] when he examined the MBE and how his answers had been scored in January, 1992." While the opinion opened by scolding McEldowney for resorting to a court rather than the admitting authority, it later concedes that he had, in fact, sought relief from the State Bar by

way of petition that was not entertained.

McEldowney filed his notice of appeal to the Ninth Circuit on December 15, 1993.

On August 9, 1994, the Ninth Circuit filed its unpublished Memorandum summarily affirming the judgment of the District Court. Appendix page 2.

On August 29, 1994, McEldowney petitioned the Ninth Circuit for rehearing in order to maintain uniformity of its own decisions and because the District Court's order was in conflict with an opinion of this Court.

On October 27, 1994, the Ninth Circuit filed its order denying rehearing. Appendix page 1.

On January 20, 1995, Justice O'Connor granted McEldowney's application for an extension of time in which to file the instant petition through and including February 24, 1995.

This petition follows.

REASONS FOR GRANTING THE WRIT:

THIS COURT OUGHT NOT LET STAND A PUBLISHED OPINION THAT SUBORDINATES THE FOURTEENTH AMENDMENT TO STATE LAW, THEREBY STRIPPING AWAY DUE PROCESS RIGHTS OF HUNDREDS OF THOUSANDS OF INDIVIDUALS PREVIOUSLY SECURED BY THIS COURT, DISCOURAGES THE PURSUIT OF HIGHER EDUCATION, AND DEMONSTRATES DISREGARD FOR THE QUALITY OF LEGAL REPRESENTATION SERVING THE AMERICAN PUBLIC.

More specifically:

I. THE NINTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S HOLDING THAT THE STATE BAR-NCBE CONTRACT HAD NO FUNCTION OF CONFERRING ANY BENEFIT ON BAR APPLICANTS.

Without examining the terms of the agreement, the District Court agreed with the NCBE that its contract with the State Bar "is not 'made expressly for the benefit of a third person,' as required by Cal. Civ. Code § 1599, in order for the contract to be enforceable by plaintiff." 837 F. Supp. 1064, Appendix page 4.

McEldowney argued below that under Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232, the State Bar owed its applicants a constitutional duty to constrain its requirements for admission (including the standards required to pass its examination) to requirements having a rational bearing on the applicants' fitness to practice law, and so by undertaking the State Bar's authority to administer and score that portion of the examination, NCBE simultaneously had assumed the State Bar's duties under Schware. The State Bar's policy of never reviewing the MBE, is a clear showing that the State Bar itself assumes that the NCBE will adequately discharge

those duties owing to bar applicants.

Nonetheless, the Ninth Circuit affirmed the District Court's inadequate analysis under state law, including its conclusion that the State Bar-NCBE contract has no function of conferring any benefit on any person who sits for the examination. The District Court's conclusion was incorrect for the following reasons:

First, the District Court chose to ignore and depart from state judicial interpretations of Section 1599 that would have allowed McEldowney's claim,[2] so that the District Court's opinion misstates state law when suggesting that it precludes McEldowney's recovery.

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[2] See, *e.g.*, Ralph C. Sutro Co. v. Paramount Plastering, Inc., 216 Cal.App.2d 433, 31 Cal.Rptr. 174 (1963) (third-party beneficiary need not be identified in the contract, but need only be a member of class to be benefitted; Outdoor Services, Inc. v. Pabagold, Inc., 185 Cal.App.3d 676, 230 Cal.Rptr. 73 (1986) (court may clothe plaintiff without regard to contract's terms where overriding policy recognizes such right without regard to parties' intentions.)

Moreover, the rights asserted under the State Bar-NCBE contract are not state-created, but flow from the Fourteenth Amendment as previously construed by this Court. Consequently, the District Court applied state law in such a manner as to frustrate the federal objective of those constitutional provisions and so, in effect, subordinated the exercise and enjoyment of those protected rights to the discretion of the State's legislature. McEldowney submits, therefore, that the District Court's application of state law, whether or not correctly interpreted, flies in the face of the Supremacy Clause set forth in Article VI, clause 2 of the United States Constitution.

Of more significance to this tribunal, the District Court's published opinion does not confine itself to adjudicating McEldowney's individual standing to sue under the State Bar-NCBE contract, but casts a much wider net: The lower court's opinion purports to foreclose

not only McEldowney's action, but actually concludes that the State Bar-NCBE contract "is not a third-party beneficiary contract under which plaintiff and others similarly situated are intended beneficiaries." 837 F. Supp. 1064, Appendix page 9. Emphasis supplied.

Given that the MBE is administered from Maine to Saipan, the District Court's published opinion, unless corrected by this Court, will impact upon the rights of hundreds of thousands of potential applicants for professional licensure who, if not assured of an enforceable right to fair admissions examinations, may well question the wisdom of investing the time and funds requisite to obtaining a professional degree.

Probably of foremost importance should be the general public's perception of the District Court's opinion. As this Court is aware, the people of the United States and its territories have, for years now, cultivated strong skepticism for the competency and integrity of lawyers

admitted to represent them. McEldowney respectfully suggests that the District Court's opinion, as it stands, telegraphs to legal consumers nationally that federal courts are indifferent to the quality of their representation, and that federal processes permit the exclusion of persons proficient in the law and the admission of persons who are not.

II. THE NINTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S INTERPRETATION OF A STATE STATUTE OF LIMITATIONS THAT SO FAR DEPARTS FROM ACCEPTED AND USUAL JUDICIAL PROTOCOL AS TO BE UNCONSTITUTIONAL.

McEldowney learned on August 5, 1992, that he had been determined to be morally fit to be admitted and would have been but for the NCBE's breach.

In dismissing McEldowney's second claim (for negligence) as time-barred, the District Court relied on California Code of Civil procedure section 340(3), the

statute of limitations that was undisputedly applicable. That section allows an action to be brought within one year *after its accrual. See* California Code of Civil Procedure section 312. Notwithstanding this Court's holding in Erie R.R. v. Thompkins, 304 U.S. 64, and the provisions of 28 U.S.C. section 1652, both the District Court and the Ninth Circuit failed and refused to follow the California Supreme Court's interpretation as to when a California statute of limitations begins to run.

In Aldaco v. Tropic Ice Cream Co., 110 Cal.App.3d 523, 168 Cal.Rptr. 59 (1980), the state intermediate court quoted from two California Supreme Court decisions:

> A cause of action in tort accrues when the wrongful act is done ***and the last element essential to the cause of action has occurred.*** ***(Neel v. Magana, Olney, Levy, Cathcart & Gelfand,*** 6 Cal.3d 176, 187, 98

> Cal.Rptr. 837, 491 P.2d 421 [...]. "[T]he period ***cannot*** run before the plaintiff possesses a true cause of action, ***by which we mean that events have developed to a point where plaintiff is entitled to a legal remedy,...*** " ***(Davies v. Krasna***, 14 Cal.3d 502, 513, 121 Cal.Rptr. 705, 712, 535 P.2d 1161, 1168.)

Emphasis supplied.

Under California law, a plaintiff alleging a breach and an injury but who cannot show causation-in-fact is not entitled to a remedy because a mere breach and injury alone do not amount to *actionable* negligence. *See, e.g.*, Thai v. Stang, 214 Cal.App.3d 1264, 263 Cal.Rptr. 202 (1989), Toscano Lopez v. McDonald's, 193 Cal.App.3d 495, 238 Cal.Rptr. 436 (1987). *See* also Katona v. County of Los Angeles, 172 Cal.App.3d 53, 218 Cal.Rptr. 19 (1985).

Consequently, until such time as McEldowney could show that he would have been admitted "but for the NCBE's breach,"[3] the last element essential to his negligence claim had not occurred, he was not entitled to a legal remedy, and the period of limitations had not begun to run. Indeed, had he received a disfavorable determination as to his moral character, the NCBE's breach would have been benign. His complaint, filed on June 1, 1993, was therefore timely under the one-year period prescribed by state law.

The Ninth Circuit affirmed the District Court's grasp of the statute whereby McEldowney should have known of the NCBE's "negligence" either when he reviewed his MBE scores, or at the latest, when he petitioned the State Bar to review the NCBE's scoring. 837 F. Supp. 1065, Appendix page 11. While

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[3] The words here quoted are those omitted by the District Court's ellipsis at 837 F. Supp. 1065.

McEldowney was then aware of the NCBE's breach, and the possibility that it may have resulted in his not being admitted, as the Ninth Circuit conceded in Berg v. First Ins. Co., 915 F.2d 460 (1990), knowledge of such speculative injuries does not commence the running of the period of limitations.[4]

In affirming the District Court, the Ninth Circuit has embraced an interpretation of a statute of limitations that (1) accelerates the running of the period to include a time prior to its accrual and (2) thereby substantially affects the enforcement of a right given by the State. Under this Court's holdings in Sohn v. Waterson, 84 U.S. 596, and Guaranty Trust Co. v. York, 326 U.S. 99, and their respective progeny, the collaborative judgments of the lower courts are constitutionally infirm and deserving of

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[4] In Burgess v. Eli Lilly & Co., 995 F.2d 646, 848 (1993), the Sixth Circuit also recognized the futility of a complaint alleging that plaintiff's injury *may* be caused by or *may* be related to, a defendant's conduct.

review and reversal.

III. THE NINTH CIRCUIT FURTHER ERRED IN AFFIRMING THE DISTRICT COURT'S HOLDING THAT THE STATE BAR'S FAILURE TO ENTERTAIN McELDOWNEY'S PETITION SEVERED THE CAUSAL CONNECTION.

Although not raised by either of the parties, the District Court interjected the argument that the State Bar's failure to rescore McEldowney's MBE was a supervening cause sufficient to shelter the NCBE from contractual liability. In support of that position, the District Court cited Metzenbaum v. R.O.S. Assoc., 188 Cal.App.3d 202, 214, 232 Cal.Rptr. 741 (1986). 837 F. Supp. 1064, Appendix page 10.

Lest that mislead this Court, Metzenbaum does not define "supervening causes" because the facts of the case presented none. Nor do the facts of the case at bar.

As noted above, it is the stated, published, and normal response of the State Bar not to intervene in such situations. As the Ninth Circuit has itself previously observed, under California law, a normal response to a stimulus or a failure to intervene is not a supervening cause. *See* USAir, Inc. v. United States Department of the Navy, 14 F.3d 1410, 1413 (1994).

CONCLUSION

In view of the simplicity of the issues presented herein, and the countless individuals who would benefit from this Court's instruction as to the law governing the rights in question, McEldowney respectfully urges the Court to grant review and to allow a writ of *certiorari* to issue.

Respectfully submitted,

JAMES KENNETH McELDOWNEY, Jr.
Petitioner, *in pro se*

FILED
OCT 27 1994

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES KENNETH McELDOWNEY, JR.,	No. 94-55036
Plaintiff-Appellant,	D.C. No. CV 93-3146 AWT Central California
v.	(Los Angeles)
NATIONAL CONFERENCE OF BAR EXAMINERS,	ORDER
Defendant-Appellee,	

Before: WALLACE, Chief Judge, HUG and RYMER, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION

FILED AUG 9 1994

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES KENNETH McELDOWNEY, JR.,	) No. 94-55036
Plaintiff-Appellant,	) D.C. No. CV 93-3146
v.	)
NATIONAL CONFERENCE OF BAR EXAMINERS,	) MEMORANDUM*
Defendant-Appellee,	)

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge Presiding

Submitted August 3, 1994**

Before: WALLACE, Chief Judge, HUG and RYMER, Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-3.

James Kenneth McEldowney, Jr. appeals pro se the district court's dismissal of his action against the National Conference of Bar Examiners ("NCBE") seeking damages for breach of contract and negligence. The district court held that McEldowney failed to state a claim upon which relief may be granted because (1) he was not a third-party beneficiary to a contract between the NCBE and the Committee of Bar Examiners of the State Bar of California, and (2) his negligence claim was barred by the applicable statute of limitations. See McEldowney v. national Conference of Bar Examiners, 837 F. Supp. 1062, 1064-65 (C.D. Cal. 1993). We have jurisdiction pursuant to 28 U.S.C. § 1291. For the reasons stated in the district court's well-reasoned opinion, we affirm the district court's judgment.

AFFIRMED.

FILED
NOV 15 1993

ENTERED
NOV 16 1993

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES KENNETH McELDOWNEY, JR., Plaintiff, v. NATIONAL CONFERENCE OF BAR EXAMINERS, Defendant.	No. CV 93-3146 AWT MEMORANDUM ORDER ON MOTION TO DISMISS

Failed bar examination applicants are continually looking for ways to bring their grievances to a court other than the admitting authority. This is one of those back-door attempts, plaintiff being a failed applicant for the California bar examination.

BACKGROUND

This is a diversity action against the National Conference of Bar Examiners (NCBE). Defendant does not challenge subject matter jurisdiction, in the sense of lack of diversity of citizenship. Essentially, the complaint alleges that the NCBE prepares and grades the Multistate Bar Examination (MBE). California, among other states, utilizes the MBE on its bar examination and did so on the July, 1991, examination which plaintiff failed.

Plaintiff alleges that his failure was caused by the MBE assigning as the "correct" answer to "one or more" questions on the examination, an answer or answers different than his own responses. The examination itself is administered by the Committee of Bar Examiners of the State Bar of California (State Bar). After being notified of his failure, plaintiff was permitted by the State Bar to examine the MBE and his answers as scored by the NCBE. He then filed a lengthy petition with the State Bar to review and correct the erroneous scoring of his MBE. The petition was denied on May 31, 1992. Plaintiff then attempted to pursue his grievances with the NCBE but has not had a satisfactory response. This action followed.

The complaint states claims for breach of an asserted third party beneficiary contract between the NCBE and the State Bar and for negligence. It seeks only damages, *i.e.*, it does not seek to compel plaintiff's admission to the bar or any other equitable relief. The NCBE has moved to dismiss for lack of subject matter jurisdiction, absolute quasi-judicial immunity, failure to state a contract claim and the bar of the statute of limitations on the negligence claim.

DISCUSSION

1. Subject Matter Jurisdiction

The NCBE contends that this court lacks subject matter jurisdiction because the California Supreme Court has original and exclusive jurisdiction over bar admission matters. However, as the cases cited in support of this proposition demonstrate, the state supreme court's exclusive jurisdiction "bar admission matters," is limited to proceedings which directly challenge the admission process or the refusal to admit an applicant. See, e.g. Giannini v. Committee of Bar Examiners, 847 F.2d 1434 (9th Cir. 1988) (per curiam) (action against State Bar challenging denial of admission as unconstitutional); Marguelis v. State

Bar, 845 F.2d 215 (9th Cir. 1988) (per curiam) (same); Smith v. state Bar, 212 Cal.App.3d 971 (1989) (suit involving payment of fee required to sit for examination).

Here, the action is against neither the state supreme court nor its "arm" for bar admission purposes, the State Bar. It does not seek admission to the bar. It is a damage action against the NCBE, an Illinois corporation. The court concludes that it has subject matter jurisdiction over this action under 28 U.S.C. §1332.

2. Absolute Quasi-Judicial Immunity

The NCBE contends that, like the State Bar (and its Committee of Bar Examiners), it should be entitled to absolute quasi-judicial immunity. However, the State Bar's immunity is based on extensive judicial duties delegated to it by statute and by the state supreme court, pursuant to which the State Bar acts as an "arm of the Supreme Court" in admission matters. See generally Greene v. Zank, 158 Cal.App.3d 497 (1984); see also Levanti v. Tippin, 585 F. Supp. 499, 504 (S.D. Cal. 1984).

Here, by contrast, the NCBE merely contracts to provide the MBE to the State Bar and to score the results

for the State Bar. The NCBE characterizes its own function, in preparing and grading the MBE as "perform[ing] an administrative function on behalf of the Committee of Bar Examiners." It is, at the least, highly doubtful that this kind of "administrative function" entitles the performer to judicial immunity. Even a judge himself or herself is not entitled to absolute judicial immunity when acting in an administrative capacity. Forrester v. White, 484 U.S. 219 (1988).

Adopting Forrester's functional approach, id. at 228-29, the court concludes that one who, under contract, merely writes questions and answers for a bar examination, to be used by bar examining authorities, but who does not have any function or authority in recommending or determining who is and who is not qualified to be admitted to the bar, is not entitled to quasi-judicial immunity. The NCBE is no more entitled to judicial immunity than a law school professor who is paid $100 for writing an essay question for the bar examination.

3. Breach of Contract Claim

The NCBE asserts that the breach of contract claim fails to state a claim because plaintiff is not a third-party

beneficiary of the contract between it and the State Bar. The court agrees that this contract is not "made expressly for the benefit of a third person," as required by Cal. Civ. Code § 1559, in order for the contract to be enforceable by plaintiff. The NCBE correctly contends that the purpose of the bar examination, and the MBE as a part of that examination, is to protect the public. It has no purpose or function of conferring any benefit on any person who sits for the examination. The court holds that, as a matter of law, the contract under which the NCBE prepares and scores the MBE for the State Bar is not a third-party beneficiary contract under which plaintiff and others similarly situated are entitled beneficiaries.

Further, the breach of contract claim must fail because, even assuming there was a breach by the NCBE, plaintiff suffered no damages as a result of such a breach. As the complaint alleges, plaintiff petitioned the State Bar to correct the asserted "errors" of the NCBE. The State Bar, which is the body with the authority to grade the examination and to assign passing and failing scores, refused to correct the claimed "error." Thus, the actions of the State Bar were a supervening cause and if plaintiff

were damaged by failing the MBE, those damages were not caused by the NCBE. The only damages recoverable for a breach of contract are for "all the detriment proximately caused thereby." Cal. Civ. Code § 3300 (emphasis added). See Metzenbaum v. R.O.S. Assoc, 188 Cal.App.3d 202, 214 (1986). For this additional reason, the breach of contract claim fails to state a claim.

4. Negligence Claim

The NCBE contends that the negligence claim is barred by the statute of limitations. It is undisputed that the applicable period of limitations is one year. Cal. Code Civ. Proc. § 340(3). Plaintiff takes the position that the statute of limitations has not even begun to run. He reasons, first, that his claimed injury is his "reduced earnings from not practicing law." He then argues that he was not deprived of his ability to practice law until after "the State Bar rendered a favorable determination as to plaintiff's moral fitness. Only then would plaintiff have been admitted to practice law . . . and only then did plaintiff's injury - and hence his cause of action - accrue."

This is a startling admission. In effect, plaintiff concedes that his claim has not yet accrued because he has

not yet been admitted to the bar. In fact, the complaint does not even allege that the State Bar has found him morally fit to be admitted to the bar. Therefore, if we are to follow plaintiff's reasoning, it appears that plaintiff's negligence claim has not yet accrued.

If it has accrued, that accrual was more than one year before plaintiff filed his complaint. The claim appears to have accrued when plaintiff was notified that he had failed the bar examination in November, 1991. Even if accrual could be postponed under some kind of "discovery" rule, plaintiff should have discovered the NCBE's asserted negligence when he examined the MBE and how his answers had been scored in January, 1992. His petition for review to the State Bar, filed in March, 1992, sets forth in detail each of the asserted errors made by the NCBE is scoring his MBE. Thus, at the latest, plaintiff knew by March, 1992, of the NCBE's negligence. This action was not commenced within one year of its accrual. See Menefee v. Ostawari, 228 Cal.App.3d 239, 245 (1991) (claim accrues when wrongful act is done and liability arises, *i.e.*, when suit may be brought); see also Davies v. Krasna, 14 Cal.3d 502, 512-

14 (1975).

CONCLUSION

For the reasons stated above, the complaint fails to state a claim as to either of its claims for relief. As indicated by the discussion above, the deficiencies in the complaint are not such as to be curable by amendment. Thus, leave to amend would be futile and is, therefore, denied.

IT IS ORDERED that the complaint and action are hereby **DISMISSED** on the merits.

Dated: NOV 15 1993

/s/
A. WALLACE TASHIMA
United States District Judge